

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TANYA N. SVOBODA,
Individually and on behalf
of all others similarly
situated,

Plaintiff,

-vs-

AMAZON.COM, INC., and
AMAZON.COM SERVICES, LLC,

Defendants.

Case No. 21 C 5336

Chicago, Illinois
April 28, 2022
9:15 a.m.

TRANSCRIPT OF TELEPHONIC PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

APPEARANCES:

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1 (Proceedings heard in open court:)

2 THE CLERK: 21 CV 5336, Svoboda versus Amazon.com,
3 Inc.

4 THE COURT: For the plaintiff?

5 MR. KUYPER: Good morning, your Honor. This is
6 Theodore Kuyper on behalf of the plaintiff.

7 THE COURT: For the defendant?

8 MR. FOUTS: Good morning, your Honor. Greg Fouts on
9 behalf of Amazon.

10 THE COURT: Good morning. This is a case that, as
11 you all know, was initially on Judge Lee's calendar, and
12 Judge Lee referred discovery supervision to Magistrate
13 Judge Cole. And then the case was reassigned to my calendar
14 earlier this month.

15 And there's a pending motion to dismiss; and there's
16 already a discovery schedule in place for both fact discovery
17 and expert discovery, and then there's a late May deadline for
18 filing motions to amend the pleadings.

19 So, I wanted to get together and discuss the motion
20 to dismiss. So, the defendant was last heard in writing, so
21 let me ask the plaintiff, if there's anything in the reply
22 brief that you'd like to orally address or any other points
23 you'd like to make or emphasize, I wanted to give you a chance
24 to do that.

25 MR. KUYPER: There's nothing specifically in the

1 reply brief that we would like to address, your Honor. Just
2 generally, as you know, it's a BIPA class action about virtual
3 try-on applications or programs that are on Amazon's website
4 and their smart phone app, and they simulate what consumers
5 would look like wearing makeup and other products such as
6 sunglasses.

7 And the virtual try-on programs require consumers to
8 upload a photo or use a video of themselves. And plaintiff
9 claims that the programs scan the consumer's facial geometry
10 and create a map or a face template of it, which is how the
11 programs know where on the consumer's face to overlay the
12 digital image of whatever product is being tried on.

13 THE COURT: Right. I understand all of that.

14 Anything further you'd like to add?

15 MR. KUYPER: Not specifically, your Honor.

16 THE COURT: All right. Very good.

17 Amazon, anything -- any points that you'd like to
18 make or emphasize?

19 MR. FOUTS: Thank you, your Honor. Greg Fouts for
20 Amazon.

21 I think the point that we want to emphasize, your
22 Honor, you know, this is a 12(b)(6) motion that we've
23 essentially said that the allegations of a BIPA violation
24 aren't plausibly pled.

25 I think the way we characterized it in our brief was

1 you have here a photograph, a camera, and a computer, which is
2 sort of Point A, and then you have a BIPA violation, which is
3 sort of Point C; but there's really not, you know, a bridge
4 between those points, I guess a Point B, if I can extend my
5 sort of clunky metaphor.

6 The way that this works as a matter of fact, and I
7 realize we're still on a pleading motion, but there's an
8 allegation that there's been biometric information stored, or
9 collected and stored. And, you know, the plaintiff says, I
10 think, only in the complaint that there's a database where
11 this is stored. There's no facts at all around this alleged
12 storage.

13 As a matter fact, this is all done within the user's
14 computer or within the cellphone app, so nothing actually
15 comes to Amazon.

16 So, those are some of the points that we made in our
17 brief, and we want to -- I just wanted to emphasize those this
18 morning.

19 THE COURT: All right.

20 MR. KUYPER: Your Honor, if I may respond to that.

21 THE COURT: Go ahead.

22 MR. KUYPER: One thing I'd like to emphasize is the
23 distinction here between the claims we allege and the
24 subsection of BIPA that deals with storage.

25 We allege a 15(a) violation, which has to do with

1 possession. We allege a 15(b) violation, which has to do
2 with the failure to obtain informed consent. This idea of
3 storage, while it's alleged, it's not a prerequisite to
4 either of the claims. It's subsection 15(e) that deals
5 with storage.

6 And so this is just a distinction I want to make
7 very clear because even if Amazon doesn't store the data
8 itself, that has no impact on the 15(a) or 15(b) claims.

9 MR. FOUTS: And if I --

10 THE COURT: Go ahead.

11 MR. FOUTS: If I could briefly respond to that, your
12 Honor.

13 THE COURT: Go ahead.

14 MR. FOUTS: I apologize. I think the word "storage"
15 I used, what I really meant was possession or receipt. So,
16 those are 15(a) and 15(b) words.

17 In any event, the point -- the overall point is the
18 same, which is that Amazon never comes into possession of this
19 data.

20 THE COURT: Okay. So I'm going to deny the motion
21 to dismiss, and I -- it's not terribly complicated, so I'm
22 just going to give my reasons on the record.

23 You know, the defendant argues that the complaint
24 doesn't plausibly allege that Amazon possesses or collects
25 biometric information, which is that facial geometry or

1 landmark data.

2 And I get the point, and it's kind of a feature of
3 *Twombly* because *Twombly* says if you're a plaintiff in a
4 complaint, you can't just mimic or repeat the elements of a
5 cause of action. And that -- you know, that's an easy
6 directive for a judge to apply in a case where, for example,
7 the statute says -- or the common law doctrine says the
8 defendant can't act negligently or recklessly in some way.
9 And let's just say the complaint just says, "The defendant
10 acted negligently," or, "The defendant acted recklessly," and
11 doesn't add anything else. I think in that situation, there's
12 a good *Twombly* argument that there isn't enough meat on the
13 bones and you're just reciting the elements of the cause of
14 action.

15 But there are other cases, and in my view, this one
16 is among them, where the statute or the common law doctrine --
17 of course, here, we have a statute -- articulates a specific
18 action. And here, it's the possession or the collection, and
19 if you want, the storage, it doesn't really matter, of
20 biometric information.

21 And so in a case like this where the complaint
22 alleges that the defendant possessed or collected particular
23 information, it's not really a good argument for the defendant
24 to say, "Well, you're just mimicking the elements of the cause
25 of action," because what else -- what else could the plaintiff

1 say at that -- at this juncture, at this early juncture?

2 And, you know, and even if that understates *Twombly*
3 to a certain extent, I think here, given the complaint's
4 description of this technology and what it does and how it
5 operates, it's certainly plausible that when this -- in the
6 process of this technology operating and a user deploying
7 the technology, this virtual try-on technology, that the
8 biometrics would go to Amazon's system and Amazon would
9 possess -- would collect the information, would possess the
10 information and, whether on a short-term or a long-term
11 basis, would store the information, although again, storage --
12 acknowledging that storage is not a necessary component of
13 either the 15(a) or the 15(b) causes of action.

14 So, for those reasons, I think that there is a cause
15 of action pleaded under -- appropriately pleaded under *Twombly*
16 and *Iqbal* for 15(a) and 15(b).

17 There's also the argument that the defendant makes
18 that the 15(a) claim is not ripe because it doesn't allege
19 that -- the complaint doesn't allege that -- either that the
20 initial purpose of obtaining the biometrics has been satisfied
21 or that there's three years since the last interaction with
22 the entity.

23 I think -- as an initial matter, I think that
24 argument misconceives the 15(a) duty. The 15(a) duty doesn't
25 kick in -- meaning the duty to have a schedule and then comply

1 with it, doesn't kick in only after three years or after the
2 initial purpose expires, whichever is sooner. I think you
3 have that obligation at the outset.

4 But even putting that to the side and accepting the
5 defendant's legal premise, the initial purpose would plausibly
6 end when a virtual makeup try-on session ends. And so even on
7 that understanding, the claim is ripe because we do have the
8 end of that -- we have the triggering of the 15(a) obligation
9 when the virtual makeup try-on session ends.

10 And so I'll stop there, but -- in terms of the
11 12(b)(6) analysis, but I want to mention that the defendant's
12 argument is really more of a 56 -- a Rule 56 argument than a
13 12(b)(6) argument. And I understand the defendant's
14 frustration in that respect because the defendant looks at
15 the complaint and Amazon looks at the complaint and says,
16 "Look, this just isn't the way things work. We never take
17 possession or control, and we never collect this biometric
18 information. It stays on the user's device," and so on and
19 so forth.

20 But that's a Rule 56 issue. And it may even be a
21 Rule 12-minus-1 issue, assuming that the safe harbor
22 requirements have been satisfied. But it's not a 12(b)(6)
23 issue because a 12(b)(6) just requires the Court to look at
24 the complaint and see whether there is sufficient allegations,
25 sufficient factual allegations that are plausible in

1 themselves and that plausibly give rise to a cause of action
2 under the legal doctrines that are set forth, that are
3 articulated. And the complaint does just that.

4 So, I'm going to deny the motion to dismiss. You're
5 in discovery supervision with Magistrate Judge Cole, so I
6 don't want to step on his toes.

7 So, let me set a status hearing, Claire, for
8 October 18th of 2022, which is going to be after the close
9 of fact discovery, which is in late September.

10 And I know that in the status report Amazon said
11 that it was going to be filing a summary judgment motion
12 perhaps in the near future. And you certainly can do that,
13 especially if you think that you have the facts to show that
14 this technology does not work in the way that the defendant --
15 that the plaintiff says that it works, in that you can show
16 that it's undisputed that Amazon never possesses or collects
17 that face geometry and the other biometric information.

18 So, having raised that, let me ask the defendant, do
19 you plan on filing a summary judgment motion at any point in
20 the near future?

21 MR. FOUTS: Thank you, your Honor. Greg Fouts for
22 Amazon.

23 I guess it depends on how you define the near future.
24 We are not in a position, I think, imminently to file an early
25 summary judgment motion, but we are certainly sort of

1 targeting that as a goal.

2 So, I can't give you a prospective date for that,
3 but I think it would be certainly during the discovery period
4 or before the close of the discovery period as it was set by
5 Judge Lee.

6 THE COURT: Got it. All right. That's fine. So,
7 I'll just keep that October 18th status.

8 Plaintiff, anything further from you?

9 MR. KUYPER: Not specifically, your Honor. I mean
10 generally, given the state of discovery and the fact that
11 we're getting stonewalled, you know, we think a summary
12 judgment motion would be premature; but since counsel says
13 it's not imminent, I'm not sure that's an issue that we
14 really need to dive into today.

15 THE COURT: All right. Anything further from Amazon?

16 MR. FOUTS: No, your Honor.

17 THE COURT: Okay. Well, thanks to you both, and
18 we'll get back together in October. And obviously, if anybody
19 files a motion that is for -- on my side of the house rather
20 than Magistrate Judge Cole's, just file the motion. I'll
21 bring you in. If either side would like a status hearing
22 with me at any time before October, just give the courtroom
23 deputy a call, and we'll bring you in as soon as we're able
24 to do so. Okay?

25 Be well.

1 MR. KUYPER: Thank you, your Honor.

2 MR. FOUTS: Thank you, your Honor.

3 THE COURT: We'll get back together in October.

4 MR. KUYPER: Thank you. Bye.

5 (Which were all the proceedings heard.)

6 CERTIFICATE

7 I certify that the foregoing is a correct transcript from
8 the record of proceedings in the above-entitled matter.

9

10 */s/Charles R. Zandi*

May 5, 2022

11 Charles R. Zandi
12 Official Court Reporter

Date

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